Discrimination and beyond in European social and economic law

Davies, G.T.

published in
Maastricht Journal of European and Comparative law
2011

document version
Publisher's PDF, also known as Version of record

DISCRIMINATION AND BEYOND IN EUROPEAN ECONOMIC AND SOCIAL LAW

Gareth Davies*

ABSTRACT

In practice and comments on EU internal market law, the Court and commentators often refer to the notion of 'market access' as if it is the keystone of the EU integration process and as if this would go beyond anti-discrimination rules. However, one cannot go beyond 'non-discrimination' without entering the sphere of 'positive action'. Yet, there is no legal, political or economic basis for positive action in the internal market context. A comparison with social law, where discrimination is a more developed concept, shows that the arguments for positive action are inappropriate to the economic context and that what are sometimes described as non-discriminatory rules constituting a restriction to free movement in fact usually constitute indirect discrimination. As for market access, economic theory tells us that the only rules that inhibit market access are those that have a discriminatory component. Thus anti-discrimination continues to be the essence of market-making and of market access and talk of 'going beyond' it is mere confusion. The goal and the logic of internal market law is substantive equality for all market actors – similarly to social law, from which it can learn much about the relevant concepts.

Keywords: discrimination; free movement; Internal market; market access; reverse discrimination

§1. INTRODUCTION

Prohibitions on discrimination are the most ubiquitous tool in European law, forming the foundation of economic and social policy. Yet such prohibitions are often criticized as being inadequate to achieve the goals of these policies. From economic lawyers one sometimes hears that it is access to markets that must be ensured by the law and

* Department of Transnational Legal Studies, VU University Amsterdam.

that discrimination is an insufficiently far-reaching tool to achieve this.[1] They enjoy considerable implicit support from the Court, which consistently phrases its judgements in terms of market access, or closely related concepts.[2] In the context of social law it is widely considered that the ultimate policy goal is equality[3] and that, similarly, a repertoire of measures beyond and beside anti-discrimination rules will be needed to achieve this.[4] The criticism in both cases is therefore that prohibiting discrimination is not enough.

However, whereas it is clear that individuals may face barriers to advancement other than discrimination in employment – for example, role models imposed upon them by their communities and by their own self-perception – it is not clear that this is the case for economic actors, at least to an extent that would justify or require regulatory intervention. Whereas individuals make trade-offs between careers and other aspects of their lives, companies are more single-mindedly focused on the pursuit of profit. It would be strange to hear of a company that failed to exploit an opportunity 'in order to have more free time', or 'because its friends and family might disapprove' or because it didn't think it would be accepted by its colleague-competitors in that market. If social policy wishes to prevent the concentration of power and status in certain groups, then it is not hard to see that merely prohibiting discrimination in employment and public services may well not be enough. By contrast, it is not clear that going beyond discrimination in

1 Most prominently, Opinion of Advocate General Jacobs in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179; Weatherill, 'After Keck: Some thoughts on how to clarify the clarification', 33 *CMLR* 5 (1996), p. 887. See for further discussion Barnard, 'Fitting the remaining pieces in the goods and persons jigsaw', 26 *ELR* 1 (2001), p. 35; Koutrakos, 'On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after Keck', 26 *ELR* 4 (2001), p. 391.

2 See e.g. Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-518/06 *Commission v. Italy* [2009] ECR I-3491; Case C-110/05 *Commission v. Italy,* [2009] ECR I-519; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273. See Wenneras and Moen, 'Selling arrangements, keeping *Keck*', 35 *ELR* 3 (2010), p. 387; Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in *Commission v. Italy* and *Mickelsson and Roos*', 34 *ELR* 6 (2009), p. 924; Pecho, 'Good-Bye *Keck*: A comment on the remarkable judgement in *Commission v. Italy*', 36 *LIEI* 3, (2009), p. 257; Tryfonidou, 'Was *Keck* a half-baked solution after all?', 34 *LIEI* 2 (2007), p. 167; Prete, 'Of motorcycle trailers and personal watercrafts: the battle over *Keck*', 35 *LIEI* 2 (2008), p. 133.

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ 180/22, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework or equal treatment in employment and occupation [2000] OJ L 303/16 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23 all contain positive action provisions 'with a view to achieving full equality in practice' (see Article 3, Directive 2006/54/EC, Article 7, Directive 2000/78/EC, Article 5, Directive 2000/43/EC).

4 See e.g. Communication from the Commission, *The Community Framework Strategy on Gender Equality*, COM (2000) 334 final; S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, Oxford, 2008); Communication from the Commission, *Incorporating equal opportunities for women and men into all Community policies and activities*, COM (96) 67 final.

the free movement context is necessary, useful, or even coherent.[5] If market opportunities are open to all, and capital is available, then all will probably compete to exploit them and economic integration will occur.

Moreover, the kinds of legal tools that can be used to go beyond a ban on discrimination are limited and controversial. In the social policy context one may imagine a wide range of soft measures, encouraging individuals to believe in their own possibilities. However, the most important additional technique from the lawyer's point of view is the use of positive action. This is the term commonly used for measures or decisions in which members of under-represented groups are actively preferred.[6] This is a reversal of the normal legal position, according to which the law aims to ensure that such membership is irrelevant to outcomes. By contrast, positive action entails discrimination against members of dominant groups. It therefore entails a certain price in individual justice, which is justified by the contribution to wider social equality. By contrast with a mere discrimination ban, a positive action measure is normatively more divided and controversial, with good and bad on both sides and more room for doubt about the optimal policy standpoint.[7]

Where it is suggested that free movement law must go 'beyond discrimination' this can only be understood as a call for positive action – some kind of requirement that governments actively prefer out-of-state economic actors over native ones. There is no third way between creating equality for all and creating advantage for some. Going beyond the former unavoidably entails the latter. Yet taking free movement law beyond discrimination is not discussed in terms of positive action and it is apparent why not: because it would be immediately dismissed, lacking any normative, political or economic basis and indeed directly conflicting with the foundational legal, political and economic principles of the internal market. That such a standpoint is nevertheless maintained by many is therefore odd and can best be explained by the absence in free movement law of any clear, consistent and substantial definitions of the central terms – of discrimination, of market access, or of a restriction on free movement. That absence allows incoherence in the law and academic doctrine to thrive.

This article aims to offer some such definitions. Its primary aim is to explain what discrimination and market access might, and ultimately do, mean. To achieve this, the article draws not just on economic law, but also on social law. Here the law and

5 See Marenco, 'Pour une interpretation traditionelle de la notion de mesure d'effet equivalent a une restriction quantitative', *Cahiers de droit européen* (1984), p. 291; Bernard, 'Discrimination and free movement in EC law', 45 *International and Comparative Law Quarterly* 1 (1996), p. 82; J. Snell, *Free Movement of Goods and Services in EC Law* (Oxford University Press, Oxford 2002); Snell, 'The notion of market access: a concept or a slogan?', 47 *CMLR* 2 (2010), p. 437; G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, The Hague 2003).

6 See generally Fredman, 'Reversing discrimination', 113 *Law Quarterly Review* (1997), p. 575.

7 See Barnard, 'The principle of equality in the Community context: Grant, Kalanke and Marschall: Four uneasy bedfellows', 57 *Cambridge Law Journal* 2 (1998), p. 352; Caruso, 'Limits of the Classic Method Positive Action in the European Union After the New Equality Directives', 44 *Harvard international Law Journal* 2 (2003), p. 331; Fredman, 113 *Law Quarterly Review* (1997), p. 575.

theory of discrimination is far more developed and explicit and both the Court and scholars have a greater awareness of what it is to prohibit discrimination and to go beyond such a prohibition. This discussion is not just a useful source of terminology and classification, but the parallels between social and economic law can be, it is hoped, at times illuminating. As well as social law, the discussion below draws on a certain amount of economic theory, in particular the theory surrounding competition. Free movement law aims at creating a single European market and not just some legal-dogmatic concept of a market, but a real market. It is not law but economics that can tell us what kinds of measure restrict free movement and market access. When law attributes legal meaning to these terms it should do so in a way that is economically defensible and not purely the result of doctrinal convenience.

§2. DIRECT AND INDIRECT DISCRIMINATION

Definitions of discrimination are conventionally traced to Aristotle, who said – rephrasing a little – that it consists in treating like situations in an unlike way, or unlike situations similarly.[8] It should be noted that this is a definition of discrimination in general, not on any particular grounds, and it is often when the general idea is translated to particular grounds that problems creep in. As a general idea it is much simpler and more accessible and amounts to no more than a prohibition on arbitrary distinctions. It is a rule of rational decision-making, which provides in substance that choices must be based on reasons.

It is notable from the above that discrimination is about treatment. Equality may be a state of affairs, but discrimination is an act, and this highlights the difference between them and their relationship. Non-discrimination law conditions behaviour in the hope of thereby bringing people closer to a state of equality.

The heart of discrimination is in the notions of like and unlike. Of course, no two people or situations are alike in all respects. Any two things are distinguishable in some way. The Aristotelian definition must be understood as referring only to relevant differences, differences that explain or justify different treatment. One of the things that any legal system (or argumentative system) must do if it wishes to rely on discrimination is determine what kinds of differences it will acknowledge as justifying different treatment and what kinds it will deny. In doing so, the legal system imposes its normative preferences on the otherwise empty discrimination vessel and turns it

8 Aristotle, *Nicomachean Ethics*, trans. WD Ross, book V, chapter 3 (Oxford University Press, Oxford 1980). See also Case C-56/94 *SCAC Srl v. Associazione dei Produttori Ortofrutticoli* [1995] ECR I-1769. Both citations taken from R.A. Lang, *The European Court of Justice's approach to equality reevaluated, with reference to the work of Michael Walzer* (University of London PhD Thesis, 2010, not yet published).

into a tool for achieving more specific social goals.[9] Thus a policy decision according to which nationality is not a relevant difference between persons in the context of economic law entails that two persons of different nationality are, from the point of view of the discrimination test, alike. Similarly, EU law has decided that sex, race, age, ethnicity, religion, sexuality and disability are also not differences that in general justify different treatment.[10] Differences in these respects do not render persons unalike, at least in the context of employment and certain economic activities.

In law, and certainly in EU law, a distinction is conventionally made between direct and indirect discrimination.[11] Direct discrimination explicitly relies on a forbidden characteristic as the basis for a choice or distinction (no women, no foreigners and so on). Indirect discrimination explicitly relies on some other characteristic, but because this characteristic correlates with a forbidden one the result is similar. For example, discriminating against unknown brands is not explicitly discriminating against foreign ones, but because in most markets there is a correlation between market profile and national origin, so that unknown brands are more likely to be foreign, the result will be quite similar.

Direct discrimination is on the whole a legally simple and straightforward phenomenon. It is easy to identify and therefore easy to combat. There is however one definitional issue of note that remains unresolved. The Court of Justice and the preamble of the relevant directive regard discrimination on the grounds of pregnancy as direct sex discrimination.[12] The principled argument for this is that only women can be pregnant, so a pregnancy-based disadvantage exclusively disadvantages women. This is not a case of some contingent correlation, such as the relationship between part-time work and sex, but a necessary correlation, so that a pregnancy-based measure is more akin to direct than indirect discrimination.

The counter argument is nevertheless more convincing. Pregnancy discrimination is not direct sex discrimination for the simple reason that pregnancy is not sex. It is self-evident that the two do not correlate perfectly. Indeed, suggesting that they do is not just factually inaccurate, but insulting to women who do not have children. It would also have the strange consequence that an employer who prefers a non-pregnant woman (or a woman who does not wish to get pregnant, or a woman who cannot get pregnant) over a pregnant one would be guilty of direct sex discrimination, a result that offends both language and logic.

9 Westen, 'The Empty Idea of Equality', 95 *Harvard Law Review* 3 (1982), p. 537.

10 See Directive 2006/54/EC, [2006] OJ L 204/23; Directive 2000/78/EC, [2000] OJ L 303/16; Directive 2000/43/EC, [2000] OJ L 180/22.

11 Case C-237/94 *John O'Flynn v. Adjudication officer* [1996] ECR I-2617; Directive 2000/43, Article 2; Directive 2000/78, Article 2; Directive 2006/54, Article 2.

12 Directive 2006/54, Recital 23. See also Opinion of Advocate General Leger in Case C-191/03 *McKenna* [2005] ECR I-7631, para. 57 and footnote 37; For critical discussion: Wintemute, 'When is Pregnancy Discrimination Indirect Discrimination?', 27 *Industrial Law Journal* 1 (1998), p. 23.

The Court does not even believe its own approach: if pregnancy discrimination is direct sex discrimination it should be simply prohibited, unless it can be brought within a positive action exemption. Rules on positive action are in principle strict and limited. This is not the approach adopted by the Court as regards pregnancy related treatment, however. In practice, the Court takes a case-by-case pragmatic approach, looking to see whether rules are justified, for example if they award slightly less than full pay during maternity leave.[13] There is much to be said for this approach, but it looks a lot more like the approach to an indirectly discriminatory measure than to a directly discriminatory one.

Ultimately, the choice whether to classify pregnancy discrimination as direct sex discrimination is an arbitrary linguistic one. Direct discrimination divides by a prohibited characteristic, creating two clean groups – for example, male and female, gay and straight, national and foreign. Indirect discrimination divides by a correlated characteristic, such as part-time working, residence abroad, or not being married, creating two groups that are both mixed, but unevenly so – for example, mostly male and mostly female, mostly national and mostly foreign, or disproportionately gay and disproportionately straight. Pregnancy discrimination is certainly odd because it creates two groups, one of which is entirely female, but the other consists of both men and women. It would be possible to make a decision to include such a situation within the definition of direct discrimination – after all, these are constructed definitions. However, it is not a desirable choice because it creates the problems of coherence and language described above. Pregnancy, like part-time work or caring for family members, is a factor that can be used as a proxy to disadvantage (or advantage) women, but it is not the same as being a woman, even if it is true that only women can be pregnant.

It is a mistake to think that the choice is a normative one. Direct and indirect discrimination are not normative categories, but merely convenient labels for the various techniques whereby preferences can be expressed. Indeed, indirect discrimination may consist of a discriminatory intent combined with an attempt to conceal this – at least as bad as direct discrimination.

The decision of the Court and legislator nevertheless to classify pregnancy discrimination as direct sex discrimination is primarily a strategic choice. Since the law does not allow direct discrimination to be justified or excused this classification is seen as offering a higher level of protection.[14] If pregnancy based measures are treated as indirect discrimination then it is possible to plead that they are justified by considerations such as cost or practicality. The fear is that national judges, who apply EU law, will be over-sympathetic to such justifications and there is therefore support for pre-empting this risk

13 Case C-342/93 *Joan Gillespie and others v. Northern Health and Social Services Boards, Department of Social Health and Services, Eastern Health and Social Services Board and Sounthers Health and Social Services Board* [1996] ECR I-475.

14 Costello and Davies, 'The case law of the Court of Justice in the field of sex equality since 2000', 43 *CMLR* 6 (2006), p. 1602–1603.

by treating pregnancy discrimination as direct. It is to be hoped that the cost in clarity and coherence that this approach brings with it is more than justified by the gains in equality between men and women. It is nevertheless hard to believe that the Court could not have addressed this risk in a more direct way, for example by setting limits to when and how pregnancy measures may be justified.

The pregnancy example shows the distorting effect of the somewhat arbitrary rule that direct discrimination may not be justified. It creates an incentive for measures to be classified as direct discrimination not according to their apparent structure, but according to whether the Court wishes to find them justified. In the economic sphere the pregnancy situation has been precisely reversed: here there have been several cases where justifiable measures were explicitly divided by nationality. In order for these justifications to be acceptable to the law, the Court therefore found that the measures were not direct discrimination, showing again how legal coherence and legal strategy are not always the most suited bedfellows.[15] The rule in economic law, as in social law, is that direct discrimination cannot be justified. However, where a measure is justified the Court finesses the issue by finding that it is not direct discrimination at all![16]

Indirect discrimination is a more complex and problematic category. Its use is a corollary of the substantive nature of a discrimination ban: the intention is not to constrain the forms of measures, but to prevent certain groups being excluded from advantages. The law aims to serve a policy goal. It therefore follows that if such exclusion is achieved by indirect means it should be just as prohibited as if it were achieved explicitly.

Where measures may be indirectly discriminatory the legal challenge is to choose between two competing descriptions of the measure. On the one hand, it explicitly divides by some factor that is not prohibited. On the other, this correlates with a factor that is prohibited. Should that correlation be treated as statistical accident and the explicit basis for the measure be accepted as real and definitive? Or should the law look behind appearances and classify the measure as, in substance, discrimination of a prohibited sort?

The approach in EU law, whether economic or social, is to accept the explicit basis as the proper classification of the measure if that basis survives scrutiny for rationality and authenticity. Does it serve some legitimate goal? Is it proportionate to that goal? If not, it will be treated as a mere cover and the measure will be labelled as no more than an indirect way of dividing on a prohibited grounds – as indirect discrimination.[17]

If discrimination law is regarded as primarily about combating bad intent, then this approach is easy to understand. If a decision-maker cannot show that her distinctions help to achieve useful policy goals, then the conclusion that she was using them to achieve other indirect results is plausible. However, it is more common to understand

15 See footnote 21 below.

16 See text to footnote 21 below.

17 Case 152/73 *Sotgiu v. Deutsche Bundespost* [1974] ECR 153; Case C-237/94 *O'Flynn v. Adjudication Officer*; references in footnote 11 above.

economic and social EU law in terms of effects. These are areas of law that aim to achieve certain results and measures are judged by their relationship to these results, rather than by the mental state of the decision-maker. There are good reasons for this effects-based preference. Firstly, it corresponds to the major reason why we have the laws and the state of affairs that we wish to achieve, which is a state of substantive equality (punishment of bad intent is perhaps a secondary reason and admittedly may contribute to that state of affairs). Secondly, many, perhaps most, important decisions within the spheres of economic and social law are taken by governments, companies or other collective or non-natural decision-makers. To speak of the 'intent' of such bodies is to run the risk of anthropomorphism.

From this effects-based perspective the law on indirect discrimination is perhaps counter-intuitive. The possibility of justifying measures having a discriminatory effect suggests that this effect is not all-important, but merely one factor in illegality. Indeed, this is the case. Firstly, to make all measures illegal that had any discriminatory effect would be quite impractical, since even pure chance ensures that no line drawn through a group of people or actors will result in perfectly balanced populations on both sides. Secondly, a focus on effects can be understood to include all the effects of a measure, not just its discriminatory one. It is a premise of non-discrimination law that discrimination serves no useful goals. However, a measure that has a discriminatory effect but serves some other legitimate purpose in a proportionate way clearly does serve a useful goal. Whereas discrimination has no redeeming qualities, measures with accidental discriminatory effects do. They are therefore, even from an effects-based perspective, not equivalent. Whereas discrimination merely requires prohibition, balancing is required where both a discriminatory effect and a justification exist,. The extent of the discriminatory effect may be part of this balancing: the greater the imbalance resulting from the distinction in question, the more powerful the justification required to save it.[18]

One of the greatest challenges surrounding indirect discrimination is constructing a practical and clear terminology. Where a measure has a discriminatory effect but is justified, and therefore legal, should this be described as 'justified discrimination' or not as discrimination at all, since the measure is justified? The cases support the better view, which is that such a measure is not discrimination. It makes a distinction based on a legitimate criterion and any correlation with a forbidden one is mere coincidence.[19] This also corresponds with the conventional legal use of discrimination as an exclusively negative term. Only unjustified distinctions attract the label, not justified ones.

However, it takes a great deal of self-discipline to maintain this terminology in conversation and writing. When a measure clearly has some discriminatory effect – or disparate impact, to use the better term – it is common to read that 'because the measure

18 Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time', 43 *CMLR* 1 (2006), p. 63; Jans, 'Proportionality revisited', 27 *LIEI* 3 (2000), p. 239; Snell, 'True proportionality and Free Movement of Goods and Services', 11 *European Business Law Review* 1 (2000), p. 50.

19 Footnote 17 above.

discriminates indirectly, it must be seen if it can be justified', or 'indirect discrimination can be justified, whereas direct discrimination cannot be'.[20] These statements are, strictly speaking, wrong. If a measure is justified, it is not indirect discrimination. However, the alternative labels for such a measure – a measure of disparate impact, or of discriminatory effect – are clumsy and have not caught on. Hence while the Court has quite clearly and coherently defined indirect discrimination as the taking of measures which have a disparate impact and are not justified, it is still common to read in articles and even judgements that indirect discrimination must be justified if it is to be legal and so on.

By contrast, on the rare occasions where directly discriminatory measures can be justified it would make sense, from an Aristotelian point of view, to describe this as justified discrimination. Perhaps only women are eligible for a certain medical test, because only women are vulnerable to a certain disease. It is a rare case where it is quite sensible to treat the sexes differently. Yet the negative associations around the word discrimination have often led the Court to avoid this label where justification exists and to treat such justified measures as justified distinctions.[21] It would appear that a distinction becomes discrimination when it is wrongful. This can be partly explained, in EU law, by the use of the term 'advantage'. Whereas Aristotle regarded discrimination simply as different treatment of similar situations, EU law has narrowed that concept slightly and, in most of its written definitions, finds discrimination only to exist where there is an advantage created for one group or another.[22] Thus treatment that is different, but not advantageous, is not, in EU law, discrimination – as in the case of the medical test, where it would be odd to say that women were being advantaged by being given access to a test that is irrelevant for men.

One question which indirect discrimination raises for a legal system is the degree of disparate impact that is necessary to raise a presumption of discrimination. All measures impact unequally to some extent, on some axis. So if the finding of even a minimal disparate impact could require a decision maker to justify her decision in court the concept of indirect discrimination would serve litigators even more than it would serve disadvantaged social groups.[23] The Court has taken the approach in sex equality law that the difference should be considerable and it may be assumed that this translates

20 See e.g. Mortelmans, 'Towards convergence in the application of the rules on free movement and competition', 38 *CMLR* 3 (2001), p. 636; Oliver, 'Some further reflections on the scope of Articles 28–30', 36 *CMLR* 4 (1999), p. 805; Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra v. Schleswag AG* [2001] ECR I-2099, para. 233.

21 Case C-158/07 *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507; Case 113/80 *Commission v. Ireland* [1981] ECR 1625; Case C-2/90 *Commission v. Belgium* [1992] ECR I-4431; Case C-379/98 *PreussenElektra v. Schleswag AG* [2001] ECR I-2099; Case C-120/95 *Nicolas Decker v. Caisse de maladie des employés privés* [1998] ECR I-1831; Case C-158/96 *Kohll v. Union des Caisses de Maladie* [1998] ECR I-1931. Compare the ambiguous language in Case C-79/99 *Julia Schnorbus v. Land Hessen* [2000] ECR I-10997; Case C-319/03 *Briheche v. Ministre de l'Intérieur* [2004] ECR I-8807.

22 Footnote 11 above.

23 See also Davies, 'Should Diagonal Discrimination Claims be Allowed?' 25 *Legal Studies* 2 (2005), p. 181.

to other areas of social law.[24] The directives speak of a 'particular disadvantage', which may plausibly be taken to express a similar 'above *de minimis*' philosophy.[25] In the internal market the issue has never been addressed directly and standard definitions speak simply of a greater impact on one group than another.[26] However, it is likely that this is more because the issue has not arisen than a conscious choice to have a lower threshold for litigation. The *Keck* proviso supports this: here the Court said that selling arrangements would fall outside the Treaty unless they had an unequal impact.[27] Yet restricting marketing and selling arrangements will almost always protect incumbents from new entrants to some extent and incumbents will almost always be more likely to be national than (potential) new entrants are. On a strict reading of the proviso, then, it would be a truly exceptional selling arrangement that did not have some unequal effect and come within the Treaty. A practical '*de minimis*' threshold for that disparate impact is implicit.

§3. SUBSTANTIVE EQUALITY AND POSITIVE ACTION

In some contexts it is considered legitimate to favour parties from under-represented or disadvantaged groups. For certain functions, for example, women or members of ethnic minorities may be actively encouraged to apply and even preferred over equally or more qualified men or members of the ethnic majority. The aim is usually to correct existing imbalances, or to compensate for wider disadvantages that members of such groups may have experienced.

Such positive discrimination, usually called positive action, goes against the usual logic of non-discrimination law. Instead of treating all people equally, irrespective of their membership of a group, it discriminates in favour of some. There is therefore, at least arguably, a price paid in individual justice. A member of the non-favoured group may be the best candidate but not succeed purely because of his sex or race, for example. On the other hand, it is a premise of such measures that in some other way, such majority individuals are advantaged: either by wider social factors, or by prejudices in institutions and systems. The broad effect of positive action measures may be to combat these circumstances and to create a more representative, more meritocratic, more just and more equal society and work environment. There is therefore a trade-off between wider justice and equality and the justice and equality of the individual decision in question.[28] While this at times attracts much fiery rhetoric, such trade-offs are part of all policy

24 Case C-167/97 *R v. Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623.
25 Footnote 11 above.
26 See cases in footnote 17 above.
27 Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.
28 See footnote 7 above.

areas – from taxation to civil liberties. Each area of law at times impacts negatively on the rights and freedoms of some, but does so in the cause of assisting others. The debate about positive action is not really one of grand principle, but one about drawing lines – about deciding in the particular context whether, and to what degree, such schemes may be desirable, because the existing system is failing to create fair or equal outcomes, or the social need for corrective measures is urgent enough to justify derogating from the usual principle of equal treatment.

One of the reasons why positive action nevertheless tends to create legal tangles and cause people to take embedded and intransigent positions is that it is often difficult to decide when it is actually occurring. In many situations it is possible to have different opinions on whom, if anyone, is actually being discriminated against. This often creates a fruitless dialogue in which parties talk past each other, with treatment that one party sees as mere non-discrimination being regarded by another as the granting of an unfair advantage.[29] Since a sense of being disadvantaged is all the more inflammatory when others – the 'advantaged' – deny that the disadvantage exists, debate becomes heated.[30]

For example, almost all universities and employers claim that when they recruit staff or students they are looking for evidence of ability, initiative and other qualities. Qualifications are evidence of this, but not an end in themselves. From this perspective it is reasonable to suggest that the background and circumstances of the candidate should be taken into account. A student with excellent grades who comes from a top school in a wealthy neighbourhood and has well-educated parents is likely to be less talented than a student with the same grades who comes from the ghetto, since it is generally much harder to achieve such grades in the latter context than the former. It would be rational, faced with two such candidates, to choose the less-privileged one, if the aim is to find the most able individual. Similarly, in a profession where women are significantly under-represented and where a tradition of sexism is usually considered to exist, such as surgery, it would be reasonable to argue that if a man and a woman both complete all their training with the same grades and apply for the same senior post, then the woman is probably better; it will have been harder for her to get so far.

Selection processes that take context and background into account can therefore be seen as seeking to achieve substantive equality.[31] They look beyond the form of a procedure to its substantive goal and are loyal to that. By contrast, a formal approach, simply looking at paper qualifications, and being blind to difference, would be applying

29 See S. Fredman, *Discrimination Law* (Oxford University Press, Oxford 2002); Bamforth, 'Conceptions of Anti-Discrimination Law', 24 *OJLS* 4 (2004), p. 693.

30 C. Taylor, *Multiculturalism and 'The Politics of Recognition'* (Princeton University Press, Princeton 1992).

31 See Case C-319/03 *Briheche v. Ministre de l'Intérieur*; Numhauser-Henning, 'Swedish Sex Equality before the European Court of Justice', 30 *Industrial Law Journal* 1 (2001), p. 121; Fenwick, 'From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law', 4 *European Public Law* 4 (1998), p. 507.

identical treatment to non-identical situations and would therefore amount to indirect discrimination against the less privileged or against women; generally, against the less entrenched and represented group.[32] Nevertheless, many will consider a selection process that takes background into account as an example of positive action and consider that the groups in question are being actively advantaged, while the poor dominant white male is being discriminated against.

Once again, there is no principled debate of any interest or importance here. It is all a question of fact. It may be, as suggested above, that for a woman to succeed in the world of surgery she must be brilliant, whereas a man need merely be competent and clubbable. Yet it may also be quite the other way round. Because of equality policies, political pressures, and the desire to avoid accusations of discrimination, hospitals may actively prefer employing women surgeons, It may be the man who must distinguish himself, and the women who merely needs to suffice. Most probably, the truth will vary between these extremes from country to country, hospital to hospital, and even individual to individual – some men thrive in a men's world, others do not, just as some women thrive in a male community and others do not. Thinking of people in terms of group membership is sometimes unavoidable to achieve social policy goals, but there is always a price paid in nuance and a risk of losing sight of the inevitable complexity of the situation as a whole.

There is a tradition in Europe of formal equality – of blindness to difference. This is often linked to the French Revolution and the desire to control and contain public power.[33] Liberty is seen as protected when the State is forbidden to single out individuals or groups for special treatment and, in the context of religious persecution, dominant in the historical thinking about liberty and equality, one can see the force of this point of view. More recently, Europeans have come to expect their States to be social engineers, to combat disadvantage in society actively and to address the relationships between groups and their relative positions. Non-discrimination law is largely a product of this sentiment. Yet actively creating a more equal society is difficult if the State must remain blind to difference. Substantive equality, and a prohibition on indirect discrimination, gives the chance for the lawmaker and adjudicator to look behind the form of measures and see what their real impacts are. Yet substantive equality is an implicit – sometimes explicit – critique and rejection of formal equality. One cannot simultaneously believe that equality lies in demanding a B+ from every candidate and that equality lies in looking at which school the candidate went to. The emotional attachment to formal equality, as a building block of modern liberal States, creates hostility to its replacement by the substantive. Just as there are always those who want to overstate the unfairness of social and educational systems, in an attempt to avoid individual responsibility, there are always those who

32 Ibid.

33 See e.g. Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France', *Brigham Young University Law Review* (2004), p. 419.

want to deny that any such unfairness exists, and for whom the need to believe in the neutral objective status of, for example, school qualifications is almost primal.

Formal equality also has the great merit that it is simple to use and transparent, and therefore assists in accountability. Substantive equality rules, such as indirect discrimination bans, create the possibility for much more effective social policy, but also for endless litigation, factual disputes, confusion and social division: without agreement on the reality and consequences of social circumstances, it is not possible to agree on whether a measure amounts to positive action or substantive equality. The departure from a formal approach therefore highlights differences in social perspective and brings them to the fore. One can see this as a welcome openness that stimulates debate, or as the cultivation of polarization. Both are possible consequences of an indirect discrimination ban.

§4. THE APPLICATION OF NON-DISCRIMINATION TO FREE MOVEMENT LAW

Free movement law often involves measures that have broad ranging effects and whose character is not immediately obvious. Whether or not a measure has a disparate impact and tends to benefit national economic actors more than foreign ones may occasionally be obvious, but will often be open to debate and empirical investigation. An indirect discrimination ban will therefore be, at times, fact-intensive and controversial.

Nevertheless, there is no doubt that such a ban exists for all the categories of movement protected by the Treaty. Not only has the Court read it into the free movement articles, but the general ban on nationality discrimination applies throughout the scope of the Treaty, were this to be necessary to fill in any gap.[34] Therefore, wherever a national measure can be shown to have a greater (negative) impact on foreign actors than domestic ones it will be prohibited unless the author of the act can show that it serves a legitimate goal and is proportionate. It is not necessary here to show that the negative impact has actually occurred, or is imminent. There is no need to show an actual victim, or a smoking gun. The fact that a measure is liable to have such an impact will be enough. The Court has shown, for obvious policy reasons, that it sees no reason to wait until a measure actually harms the market before acting against it.[35]

If the law on free movement is primarily a ban on nationality discrimination, then this is almost all that there is to know about that law. There are the basic definitions discussed above in this paper and the rest is mere evidence. For the author of a measure that is considered to be an obstacle to free movement there is the possibility of justification, but

34 See Article 18, The Treaty on the Functioning of the European Union (Consolidated Version) [2008] OJ C 115/47.

35 Case C-8/74 *Procureur du Roi v. Benoît and Gustave Dassonville* [1974] ECR 837; Case C-6/01 *Anomar v. Estado Português* [2003] ECR I-8621; Case C-398/95 *SETTG v. Egasias* [1997] ECR I-3091.

the most definitive defence is to show that the measure impacts on national and foreign actors equally. The possibility of discrimination, and thus of illegality, is thereby removed. The measure may be silly, it may be unnecessary and it may amount to over-regulation, but it would not be, on a discrimination-based understanding of free movement, a violation of free movement law.

§5. MARKET ACCESS

No one doubts that discrimination against foreign economic actors is prohibited by free movement law, but it has been suggested that it is not, or should not be, the central concept of that law.[36] An alternative reading sticks apparently more closely to the wording of the Treaty and suggests that all measures that restrict free movement should be prohibited, whether or not they discriminate. The idea of the internal market is that all economic actors should have access to all parts of the European market, thus to all the markets of the Member States. Any measure that restricts inter-state movement hinders this access. Thus a reading of the Treaty that does not focus on discrimination, but on removing restrictions on movement, is often put forward as a 'market access' approach, and market access is the concept that competes with discrimination as a guide to the deep structure and logic of free movement law. The Court appears to have a certain sympathy for this view, at least in its rhetoric. While the substance of its case law can be largely explained in terms of discrimination, it shows a preference for the language of market access, only cases on citizenship and workers tending to turn around discrimination.[37]

Market access is seen as preferable to discrimination for three reasons. One is that it seems more straightforward, accessible and practical. Since the Treaty speaks of restrictions on movement, and of an internal market, why not work with these concepts and avoid introducing new ones? If the point is to achieve free movement, as the very term free movement law suggests, then why not have a law whose fundamental question is 'does this measure hinder movement' or at least the substantially identical question 'does this measure hinder access to the market for out-of-state actors'? Discrimination requires us to engage in comparison, which is evidentially, and sometimes doctrinally, complex, while the market access question seems straightforward and commonsensical by comparison.[38]

Another reason to prefer market access is that it is less inflammatory. The very term 'discrimination' and the accusation that it entails encourage defensive and over-heated reactions. Many of the measures that obstruct the creation of an internal market are not the product of conscious xenophobia or protectionism, and it may be politically more constructive and effective to identify and engage with them in terms of their market

36 See footnote 1 above.
37 See footnote 2 above.
38 See C. Barnard, *Substantive EU Law* (2nd edition, Oxford University Press, Oxford 2010), p. 19.

access consequences without attaching the label of discrimination and implicitly thereby accusing their author of this illicit act. Discrimination, it can sometimes seem, belongs to the polarized world of social law and not to the relatively socially homogenous and mutually affirming world of economic regulators and lawyers, where the preference is for non-contentious language and the status-enhancing presentation of choices in 'objective' terms. Bringing in claims of discrimination spoils the mood.

However, the most fundamental reason to prefer market access as a guiding concept is the claim that a mere ban on discrimination does not go far enough to create the internal market. If a barrier to movement cross-border trade exists, it has been argued, then it does not cease to exist because a similar barrier exists for domestic trade.[39] Removing barriers to trade, therefore, is independent of the issue of discrimination. A mere discrimination ban leaves non-discriminatory barriers to trade untouched.

Yet the suggestion that market access offers an alternative to discrimination for understanding the law has serious, ultimately fatal, problems.[40] Most fundamentally, it is self-contradictory: the 'non-discriminatory barrier to trade' does not exist, because what obstructs trade is discrimination. In the absence of discrimination, there is no barrier. Equally applicable rules – those applied identically to all market actors – are often cited as examples of non-discriminatory barriers to trade. However, if these rules fail to take into account the different circumstances surrounding producers in different countries – for example if they fail to have a mutual recognition clause – then they will in fact amount to indirect discrimination. To describe the unjustified application of product rules such as those in *Cassis de Dijon* as non-discriminatory is a simple legal error, rejecting the definitions provided repeatedly by the Court and legislation.

Nevertheless, the essential point is not that non-discriminatory barriers to trade are absent from the case law, since this could be a mere contingent fact. The essential point is that this is necessarily so: the very idea of a non-discriminatory barrier makes no sense. This follows from basic theory about the working of markets and competition, which tells us that measures regulating a market do not deter market entry simply because they impose costs or regulatory burdens on participating in that market.[41] If those costs or burdens have an equal impact on all market actors then it will be possible to recoup them from the consumer in the ultimate price without this resulting in any loss of competitive position and so they will not deter actors. The burden will ultimately not be borne by the market actors at all, but by the end-consumer. Fundamentally, businesses do not care about absolute levels of regulation, but about relative levels: their concern

39 Opinion of Advocate General Jacobs in Case C-412/93 *Leplerc-Siplec*.

40 See Davies, 'Understanding market access: exploring the economic rationality of different conceptions of free movement law', 11 *German Law Journal* 8 (2010), p. 671.

41 Harbord and Hoehn, 'Barriers to entry and exit in European competition policy', 14 *International Review of Law and Economics* 4 (1994), p. 411; McAfee *et al*.,'What is a barrier to entry?', 94 *American Economic Review* 2 (2004), p. 463. See also discussion in Davies, 11 *German Law Journal* 8 (2010), p. 680–683.

is to avoid being more heavily burdened than their competitors. If everyone however bears high but identical burdens this becomes a complete competitive irrelevance. In competition law, which is far more theoretically grounded than free movement law, the concept of a 'barrier to entry' defines a measure that prevents or hinders new entry to the market – essentially a market access barrier by another name.[42] Economists have put forward various definitions of a barrier to entry, but what they share is that the measure has an asymmetric effect; it protects incumbents from new entrants.[43] The challenge, for economists, is the empirical problem of defining which measures have this effect. However, there is agreement that such an asymmetry is the core of what makes a measure market-excluding.

It may be suggested that the picture above does not work in reality. For example, a regulation increasing the costs of market entry, even if applicable to all market participants, may deter businesses in States where it is hard to raise capital, or may deter smaller businesses who may consider it too risky. Even equal-burden rules may therefore, it could be argued, deter entry in the real world. However, this misses the logical point: if the measure actually has the effects described, so that as a result of problems with access to capital or varying firm sizes it discourages market entry, then it will be, as a matter of fact, discriminatory in effect. The identity between inequality and restraints on market access is not a contingent one, but a necessary one.

This can be presented in simple logical terms. In each market there are certain incumbents. Potential new entrants to the market must consider the chance that they have of taking a share of the market at a price that enables a profit and at an acceptable risk. If a measure affects market circumstances in a way that makes such new entry relatively less attractive, then it will benefit the competitive position of incumbents and give them a certain protection from new entry. It will be a barrier to entry and to market access. It will also have a disparate impact and insofar as it is not justified will amount to discrimination against new entrants and in favour of incumbents, according to the conventional definitions above. If, on the other hand, a measure affects market circumstances in a way that does not affect relative competitive positions – it makes market entry neither more or less attractive – or which actually encourages market entry and weakens the relative position of incumbents, then it cannot be discrimination against new entrants. However, nor is it a barrier to market access, since it is part of the definition of the measure that it does not deter entry.

In other words, it is the fact of relatively advantaging incumbents that makes a measure potentially discriminatory and that makes it a barrier to market access. By contrast, the fact of not advantaging incumbents would, by definition, mean a measure was neither a barrier to market access nor discriminatory against new entrants.[44] Relative advantage,

42 A. Jones and B. Sufrin, *EC Competition Law* (3rd edition, Oxford University Press, Oxford 2008), p. 85.

43 See footnote 41 above.

44 Except perhaps at the extreme, where a measure effectively causes a market to cease to exist. See e.g. Case C-110/05 *Commission v. Italy*; Case C-142/05 *Mickelsson and Roos*. See for further discussion

the essential part of discrimination, is what creates market access barriers. A measure that creates no such relative advantage does not hinder access. The protective effect that some measures have is both necessary and sufficient to create a barrier to market access and a disparate impact.

The discrimination which is an essential part of any barrier to market entry is not discrimination on grounds of nationality, but discrimination against new entrants. These are not necessarily the same. However, as a contingent fact, in the EU internal market, incumbents are more likely to be national firms or actors and potential new entrants are more likely to be non-national. Any measure which advantages incumbents and relatively disadvantages potential new entrants will, as a matter of fact, tend to have a disparate impact along the nationality axis, as well as along the incumbent/entrant axis. Market access barriers will therefore inevitably, unless they can be justified, constitute discrimination on grounds of nationality.

There is, however, a reluctance to label many measures as discriminatory, despite their incumbent-protecting effects. This arises, it is suggested, because it is perceived as unfair, or even incorrect, to treat a State as a wrongdoer when in fact the market inequality arises from a number of factors, for only some of which the State is responsible. For example, it is quite clear that the application of product standards to imports, just as a failure to recognize foreign qualifications, can have a significant exclusionary effect. However, the 'real' problem here is not just the result of the behaviour of the destination State, but a broader problem of differing standards and qualifications and a lack of trust and procedures for recognition. If imports were hindered by the standards for fruit wine in Germany under discussion in *Cassis de Dijon* this was because those standards differed from the ones in force in France or other Member States.[45] The cause of the disparate impact was not only in the German measures, but also in the measures of other States and in their relation to each other. Why then blame Germany and not France for the problem? In fact, since the problem is one of differing standards, rather than of any particular standard, surely it makes no sense to blame any particular State, or accuse any State of discrimination. It could be argued that EU law should seek to find solutions – as in managed mutual recognition – but not to apportion blame to individual States artificially for failures of broader co-ordination. Hence, one notes in much of the writing about the internal market an implicit reluctance to use the discrimination label and to see equally applicable market access barriers in such terms.

This is, however, a simple failure to analyse the situation thoroughly. Whatever the context, and however many problems it raises, the actions of a State are to be judged by whether they are a justified reaction to that context. The fact that there may be problems outside its control is irrelevant to the question of whether it reacted to the circumstances

Davies, 11 *German Law Journal* 8 (2010).

45 Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein 'Cassis de Dijon'* [1979] ECR 649.

created in a justified way. One may consider an analogy with social law. If, as a matter of fact, social and educational circumstances make it far harder for women to qualify as judges, then it will be the case that a female candidate judge with the same paper qualifications as a male one will tend to be better, in terms of her talent and abilities. If an appointment body, looking for the most able judges, treats them both the same, then this will amount to indirect discrimination, since it will relatively disadvantage women of equal talent and ability and it is not obvious what justification could be put forward – unless a particularly good argument could be made for the importance of a transparent and formal approach. The fact that the appointment body is not to blame for the sexist circumstances prevailing in society and educational institutions in that State is quite irrelevant to the question of its responsibility, which is to form an objectively justifiable view on the question of which candidate is best able to fulfil the function. It is expected to react appropriately to actual circumstances, not to behave as if it is located in some hypothetical utopia. Similarly, in the internal market there are many problems caused by differences in laws, interactions between laws, variations in regulatory philosophy and tendencies to over- or under-regulate. What is expected of each Member State is that it reacts in a justified way to the circumstances before it, not that it solves all the problems of the market single-handedly. In *Cassis* the argument was made that imposition of the German rules would exclude potentially competing products from the market. It was quite clear that this was indeed true and that the effect would be to protect incumbents. The question for the German regulator was whether, in the light of this, it could find sufficient justification to impose its standards nevertheless. On that issue opinions continue to differ, but if the Court was right, and there was no real need to impose the standards, then labelling the German approach as discrimination is both legally and normatively simple and appropriate. It was then the wrongful exclusion of potential foreign market entrants. The broader market context and the story of how legal variation has been allowed to create such problems in Europe is interesting but should not be allowed to confuse.

If market access is nevertheless used to justify applying free movement law to measures that do not discriminate, then the question is what the results of this will be. This raises the second, almost equally serious, problem surrounding the term. The suggestion commonly made is that a market access approach to the internal market is close to deregulation, no longer about removing discrimination against foreign actors but about reducing the level of regulation generally by subjecting anything hindering economic activity to a proportionality test.[46] While this is an obviously controversial reading of Treaty articles specifically directed at cross-border trade, it enjoys some support from a broader policy perspective, where the argument is that European markets are often over-regulated, or inefficiently regulated, and that removing such superfluous

46 Spaventa, 'From *Gebhard* to *Carpenter*. Towards a (non)economic European constitution', 41 *CMLR* 3 (2004), p. 743.

and undesirable regulation is an important part of achieving the economic and social gains which a single market promises. Taking a broad view, it could be argued that the purpose of free movement law is to create a single European market, which by allowing more competition and more scale than national markets, will contribute to the well-being of Europe. If however, unjustifiably anti-business measures are allowed to remain, then these purposes will be frustrated. Hence, it might be argued, eliminating superfluous burdens on economic activity is a proper part of free movement law.

Yet this glosses over the fact that free movement law only applies to cross-border situations and not to wholly internal ones,[47] notwithstanding a certain tendency of the Court to accept a wide definition of 'cross-border' the principle remains entrenched in the law.[48] Hence while the importer or migrant can challenge product standards or practice requirements in their destination State, the domestic producer or service provider cannot challenge those rules insofar as they affect domestic sales.[49] Absent a cross-border connection, free movement law does not interfere.

The consequence of this is that any extension of free movement law beyond discrimination amounts to positive action for importers – the active promoting and advantaging of foreign importers, firms and service providers over domestic ones, or, to put it another way, discrimination against national economic actors. Since what free movement law does is require a Member State to cease applying a particular law to out-of-state actors, and this is always because the law in question is claimed to create a problem for those actors; it is an uncontroversial premise that each application of free movement law is intended to, and will, improve the position of those actors. Either this can be explained in terms of removing a disadvantage and creating substantive equality, or, if not, then it must be a case of creating a positive advantage. There is no middle way. One cannot selectively disapply laws without changing relative competitive positions and one cannot change relative competitive positions without benefitting someone.

There is of course no consensus for positive action in the internal market. It is hard enough for the institutions of the EU to create any level of moral indignation about discrimination against the foreign, the perception that it is normal to put domestic actors first still being widespread. A suggestion that these should be actively disadvantaged and that foreign actors should be preferred would be rejected out of hand by the political actors of the EU and would enjoy no support from economists – it is merely the replacement of protectionist market distortions by market distortions of another kind. The only argument in favour might be an integrationist one: that the ultimate benefits of forced

47 Case C-98/86 *Mathot* [1987] ECR 809; Case C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171; Case C-108/98 *RI.SAN* [1999] ECR I-5219.

48 Case C-60/00 *Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279; Case C-212/06 *Government of the French Community, and Walloon Government v. Flemish Government* [2008] ECR I-1683; Case C-245/09 *Omalet NV v. Rijksdienst voor Sociale Zekerheid*, Judgement of 22 December 2010, not yet reported.

49 Case C-98/86 *Mathot*.

integration and the final creation of a multi-national market justify short-term economic injustice and inefficiency. This is the analogue of the argument used in the social context to push under-represented groups higher up the career ladder.

Yet the comparison reveals the weakness of the argument. Firstly, some of the most important justifications for positive action in social law do not translate to the market context: consumer prejudices against foreign companies and the self-perception of businesses that they do not 'belong' in foreign markets are not, it is suggested, major reasons for non-entry. The need to combat entrenched psychological perspectives is less apparent in the market context than the social. Secondly, it may be noted that even in social law the Court has been very reluctant to allow positive action to extend beyond preferences for the under-represented 'all else being equal'. The active promotion of less-qualified minority candidates because of their minority status is still subject to extremely strict contextual conditions and excluded from most normal employment situations.[50] The cost in individual justice is perceived to be too high to depart far from the usual principle of non-discrimination. It is hard to see that the case for such departure is stronger in the economic context, and therefore that the Court would be prepared to go further with a positive action doctrine in the internal market.

Going 'beyond discrimination' can therefore only be plausibly understood if it goes along with a call to abolish the internal situation, so that superfluous regulation is abolished for all market actors. One argument is that if such regulation is removed for out-of-state actors then in practice this pressures States to disapply those laws domestically too, in order to prevent their own firms being at a disadvantage.[51] Yet this empirical suggestion, while sometimes true, does not provide a convincing normative argument for such a leveraging approach. When the Court finds application of a measure to an out-of-state actor unjustified, this is invariably in part because of that actor's out-of-state character and the regulation to which it has already been subject elsewhere. The same logic does not apply domestically. Thus the finding that it was not justified to apply the rules in *Cassis* to imports does not provide a complete argument for not applying them domestically, since the actual finding was based partly on the fact that the products complied with French law. The same arguments show why abolishing the internal situation and applying free movement law directly to domestic actors is not realistic. The fundamental free movement law question is not whether law is good or wise, but whether it sufficiently takes account of the specific characteristics, in particular

50 Case C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539; Caruso, 44 *Harvard International Law Journal* 2 (2003), p. 331.

51 Barnard and Deakin, 'Market access and regulatory competition' in C. Barnard and J. Scott (eds.), *The Law of the European Single Market* (Hart Publishing, Oxford 2002), p. 197; Reich, 'Competition between legal orders: a new paradigm of EC law?', 29 *CMLR* 5 (1992), p. 861; Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law', 48 *International and Comparative Law Quarterly* 2 (1999), p. 405; Deakin, 'Legal diversity and regulatory competition: which model for Europe?', 12 *ELJ* 4 (2006), p. 440; Scharpf, 'The European social model: coping with the challenges of diversity', 40 *Journal of Common Market Studies* 4 (2002), p. 645.

the out-of-state character, of an actor.[52] In an internal situation that question simply makes no sense. Abolishing the internal situation would require a new philosophy for the internal market, in which it would not be about inter-state movement, but about central regulation *per se*.

Aside from the fact that this is an implausible reading of the Treaty articles, it would contain a certain irony. It would amount to the centralization of regulation in the name of efficiency. This captures a certain tension widely prevalent in internal market law, regulation and regulators – the desire to take control at the centre, in order to create a better market. We all think, regulators included, that we know best what is good for everyone in the market, whether that be the market for goods, services, or regulation itself. Yet the first lesson of market economics is that we do not. It is one thing to harmonize by agreement between States, also a form of centralization, but with the co-operation of the decentralized parts. It is another for a central (judicial) body to adjust the values represented in local regulation, not because this aids movement, but purely in the name of better, more efficient law. That looks like delusion.

§6. CONCLUSION

Trade and competition are all about relative competitive position and about advantages and disadvantages. The aim of economic law is to supervise the use of power, whether public or private, in order to prevent the unjustified creation of advantages or disadvantages for some.[53] The goal, as with harmonization, is to create a level playing field in which merit and efficiency, rather than the preferences of market regulators for some actors over others, determine who succeeds.[54] Free movement law is part of this project. It too aims to prevent the unjustified creation of advantages or disadvantages for new or established, foreign or national, market actors. Equality, and comparison, is therefore the essence of market law. Indeed, since there is nothing more essentially competitive than a market, and since competition is essentially about relative advantage and disadvantage, and since advantage and disadvantage are quite easily definable in an economic context, one might say that discrimination-based thinking is even more

52 M. Poiares Maduro, *We The Court: The European Court of Justice and the European Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford 1998).

53 See e.g. Case C-730/79 *Philip Morris Holland BV v. Commission of the European Communities* [1980] ECR I-2671; Case C-221/06 *Stadtgemeinde Frohnleiten v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* [2007] ECR I-9643; Bovis, 'The Regulation of Public Procurement as a Key Element of European Economic Law', 4 *ELJ* 2 (1998), p. 220; Article 110 TFEU; Case C-376/98 *Germany v. Council* [2000] ECR I-8419; Van Der Laan and Nentjes, 'Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity', 11 *European Journal of Law and Economics* (2001), p. 131; Case C-376/98 *Germany v. Council* [2000] ECR I-8419; Dashwood, 'The limits of European Community Powers', 21 *ELR* (1996), p. 113; Weatherill, 'Harmonisation: how much, how little?', 16 *European Business Law Review* 3 (2005), p. 533.

54 Ibid.

at home in markets than in social law, where thinking in terms of equality sometimes requires us to forget that people are both apples and pears – in some ways too diverse for comparison to be the most enriching model for thought.

If economic law loses sight of its comparative nature it becomes arbitrary, unfair and inefficient. Arbitrary, because then it merely amounts to courts imposing their regulatory preferences on local communities. Unfair, because it entails creating inequality in favour of the foreign, something for which there is no normative consensus, nor Treaty basis. Finally inefficient, because such inequality is a market distortion just as much as is favouring the local and because there is no basis in economic or legal thinking for the idea that a central European court is better informed on the preferences and values of a national population than is their local legislator.

Market access as a legal term may remain. If discrimination upsets, then the cause of good relations provides an argument for another label. However, if lawyers forget that market access is merely another name for market equality and for a ban on substantive discrimination then they will tie themselves in ultimately destructive legal knots.